

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**UNITED STATES OF AMERICA and the
STATES OF TENNESSEE ex rel. JEFFREY
H. LIEBMAN and DAVID M. STERN, M.D.**

Relators,

v.

**METHODIST LE BONHEUR
HEALTHCARE,
METHODIST HEALTHCARE-MEMPHIS
HOSPITALS, THE WEST CLINIC, PLLC
d/b/a WEST CANCER CENTER, WEST
PARTNERS, LLC, LEE SCHWARTZBERG,
M.D., ERICH MOUNCE, CHRIS MCLEAN,
GARY SHORB, AND JOHN DOES 1-100**

Defendants.

Case No. 3:17-CV-00902

**District Judge William L.
Campbell, Jr.**

**Magistrate Judge Barbara D.
Holmes**

**METHODIST DEFENDANTS'
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

Defendants Methodist Le Bonheur Healthcare, Methodist Healthcare-Memphis Hospitals, Gary Shorb, and Chris McLean (collectively, “Methodist Defendants”) file this Motion to Dismiss the Second Amended Complaint (“SAC”) filed by Plaintiff-Relators Jeff Liebman and David Stern, M.D. Relators claim that Methodist Defendants violated the Anti-Kickback Statute (“AKS”), 42 U.S.C. § 1320a-7b(b), and Stark Law, 42 U.S.C. § 1395nn(a)(1); 42 C.F.R. §§ 411.350-.389, through their affiliation with the West Clinic, PLLC, thus rendering Methodist Defendants’ claims for payment false under the False Claims Act (“FCA”), 31 U.S.C. §§ 3729(a)(1)(A), (B), (C), and (G), and analogous Tennessee state laws, Tenn. Code Ann. §§ 71-5-182(a)(1)(A)-(D). As set forth in the accompanying Memorandum of Law, the SAC should be dismissed for three, independent reasons.

First, the FCA's "first-to-file" bar prohibits Stern from intervening in the action through the SAC as a second relator. 31 U.S.C. § 3730(b)(5); *U.S. ex rel. Fry v. Guidant Corp.*, 2006 WL 1102397, at *6 (M.D. Tenn. Apr. 25, 2006). If the Court decides it is appropriate to dismiss the SAC without prejudice, only Liebman should be permitted to file any third amended complaint.

Second, Relators have failed to plead any facts with the particularity required by Federal Rule of Civil Procedure 9(b) identifying any false claims that were actually presented to the government for payment. A false claim is the "*sine qua non*" of an FCA violation, *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 878 (6th Cir. 2006) (citation omitted), and the Sixth Circuit imposes a "strict requirement" on relators to "identify actual false claims." *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 472 (6th Cir. 2011). Relators plainly failed to do so.

Third, Relators have failed to plead the falsity of any claims with the particularity required by Rule 9(b). To survive a motion to dismiss, Relators must sufficiently plead with particularity that Methodist Defendants committed an underlying violation of the AKS or Stark Law. *U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc.*, 2013 WL 146048, at *12 (M.D. Tenn. Jan. 14, 2013). They have not done so here.

Because the SAC runs afoul of the FCA's first-to-file bar and Relators' claims have not been pleaded in accordance with the requirements of Rules 8(a), 9(b), and 12(b)(6), Methodist Defendants respectfully ask this Court to dismiss the SAC with prejudice.

Dated this 9th day of March 2020.

Respectfully Submitted,

/s/ Brian D. Roark

Brian D. Roark

J. Taylor Chenery

BASS, BERRY & SIMS PLC

150 Third Avenue South, Suite 2800

Nashville, TN 37201

Telephone (615) 742-6200

Facsimile (615) 742-6293

*Attorneys for Defendants Methodist Le
Bonheur Healthcare, Methodist Healthcare-
Memphis Hospitals, Chris McLean, and
Gary Shorb*

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served on the following counsel today, March 9, 2020, via the Court's CM/ECF email notification system:

Bryan A. Vroon
Law Offices of Bryan A. Vroon, LLC
Atlanta, GA 30327
(404) 441-9806
bryanvroon@gmail.com

David Rivera
Jerry E. Martin
Seth Marcus Hyatt
Barrett Johnston Martin & Garrison, LLC
Philips Plaza
414 Union Street, Suite 900
Nashville, TN 37219
(615) 244-2202
drivera@barrettjohnston.com
jmartin@barrettjohnston.com
shyatt@barrettjohnston.com

Edward D. Robertson, Jr.
Bartimus, Frickleton & Robertson
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
chiprob@earthlink.net

Kara F. Sweet
U.S. Attorney's Office (Nashville Office)
Middle District of Tennessee
110 Ninth Avenue, S
Suite A961
Nashville, TN 37203-3870
(615) 401-6598
kara.sweet@usdoj.gov

Scott M. Corley
Office of the Attorney General of
Tennessee
Civil Rights and Claims Division
P.O. Box 20207
Nashville, TN 37202-0207
(615) 253-1103
Scott.corley@ag.tn.gov

John-David H. Thomas
Waller, Lansden, Dortch & Davis, LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219
(615) 850-8682
jd.thomas@wallerlaw.com

/s/ Brian D. Roark